IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	'	
BRYAN KEITH CRUM, Debtor .	'	CASE NO. 99-45308-DML.-7
DONALD REA, Plaintiff	'	
vs.	'	ADV. NO. 00-4013
BRYAN CRUM, Defendant	'	

MEMORANDUM OPINION AND ORDER

Before the Court is Donald Rea's ("Rea") Objection to Exempt Property (the "Objection") filed on January 26, 2000 in opposition to exemptions claimed by the debtor under 11 U.S.C. § 522 and Texas law. This matter was initially heard by the Hon. Massie Tillman over a three day period[1] and taken under advisement. After Judge Tillman completed his term, it was initially reassigned to Hon. Barbara J. Houser[2] and finally was assigned to this Court on September 24, 2001.

On January 31, 2002, the Court held a status conference with counsel for the parties and requested that they submit to the Court those items in the record to which they wished the Court to pay particular attention as well as any additional briefs they deemed appropriate. The Court

[1]Judge Tillman held evidentiary hearings on July 26 and 31, 2000 and August 23, 2000.

[2]Nothing having a bearing on the Court's decision occurred during Judge Houser's administration of the case though Judge Houser held a status conference and initiated a schedule for resolving the matter which was helpful to the Court.

has since listened several times to tapes of the hearings before Judge Tillman, read and referred to transcripts of those tapes,[3] carefully studied the materials submitted by counsel and reviewed the entire file of this chapter 7 case.[4] The Court is thus prepared to render a decision. This memorandum constitutes the Court's findings of fact and conclusions of law. *See* FED. R. BANKR. P. 7052 and 9014.

I. Background

Bryan Crum ("Debtor" or "Crum") and Rea were neighbors who jointly produced for sale household items designed to appeal to sports fans. Rea performed a manufacturing function, while Crum, under the name of Legacy Designs, Inc.,[5] handled sales, distribution and invoicing. Though initially friends as well as neighbors and business associates, Crum and Rea had a falling out in 1998, and Rea sued Crum, seeking a greater share of the value produced by their joint efforts. The suit was resolved by a judgment signed on November 5, 1998 (the "Judgment") which was based upon a settlement agreement (the "Settlement") executed by the parties. The Judgment was in the amount of $90,000. Pursuant to the Settlement this was to be paid $45,000 down, $15,000 on the first anniversary of the Settlement and $10,000 on each of the two succeeding anniversaries.

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[3]The Court also reviewed a transcript of the May 17, 2000 hearing in this matter to ensure it contained no relevant information.

[4]The Court has also scanned two accompanying adversary proceedings: a complaint by Rea against Crum under 11 U.S.C. § 727 and a fraudulent inducement action (abandoned by the Chapter 7 trustee) by Crum against Rea.

[5]Crum incorporated Legacy Designs under the name "LDI Legacy Designs, Inc." in 1996. The corporation will hereafter be referred to as "LDI."

Within a few days after the Settlement, Judgment and Crum's payment of the initial $45,000, Rea purchased another judgment against Crum for ten dollars (the "R&E Judgment"). Also, commencing at the end of 1998, Crum began sheltering his net worth through use of Texas exemption laws, taking steps that included the conversion of non-exempt property into exempt property.[6] In particular, Crum and his wife[7] acquired an annuity to replace certain savings and securities accounts, took title to a 1998 Chrysler owned by LDI in satisfaction of a promissory note from LDI to Crum and (in June of 1999) bought a new, larger home with proceeds of the sale of their existing home plus other funds which were not exempt. Shortly prior to the purchase of the new home, another judgment creditor[8] of Crum brought a garnishment action against LDI. Crum arranged to dispose of this action by paying the judgment creditor about 25% of the amount of the judgment.[9]

A little more than 30 days before the second ($15,000) payment was due from Crum under the Settlement, Rea began steps to collect the R&E judgment. Rea succeeded in garnishing Crum's bank account at Guaranty Federal Bank, trapping more than $5,000. In response, Crum filed this chapter 7 case on October 7, 1999.

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[6]Though Rea and his counsel repeatedly claimed during trial that a due on sale clause in the Settlement required that Crum not dispose of assets, the clause (¶ 14 of the Settlement) in fact only applied to transfer of the stock of LDI.

[7]Mrs. Crum is not a debtor in this case or a party to this matter.

[8]Like the R&E judgment, this judgment had been dormant for a number of years.

[9]Just as Rea's testimony that he bought the R&E Judgment only to make money is a factor in the Court's conclusion that Rea is not a credible witness so, too, Crum's testimony that he paid this judgment to "do the right thing" contributes to the Court's doubts about his veracity. The Court takes this opportunity to note that it is extremely skeptical of any testimony by either party concerning his motives, thought processes, personal feelings or intentions. Rea's testimony at trial was repeatedly contrasted with inconsistent statements at his deposition, and Crum's testimony was evasive and self-serving.

Initially Harry Cure was appointed interim trustee in the case. Mr. Cure resigned, however, when he realized he had been trustee in the bankruptcy of Unique Gifts, Inc. ("UGI") (one of Mr. Crum's prior business ventures) in which case he had taken a judgment[10] against Crum. Mr. Cure ultimately was the only claimant in this case other than Rea.[11]

Crum filed his initial schedules and statement of affairs on October 7, 1999. He has since twice amended his schedules, including to assert the family personal property exemption (subject to a cap of $60,000.00; *see* TEX. PROP. CODE § 42.001(a)(1) (Vernon 2002)) instead of the single person exemption (subject to a cap of $30,000; *see* TEX. PROP. CODE § 42.001 (a)(2) (Vernon 2002)).

Subsequent to filing his Chapter 7 petition, Crum paid an additional $13,000 to his counsel. Crum claims the $13,000 came from his wife's funds. Rea, however, has attacked the payment in the Objection, referring to FED. R. BANKR. P. 2017 (*See* 11 U.S.C. §329).

With the exception of the Objection, the litigation mentioned in note 4, *supra*, and a series of related squabbles between Rea and Crum, there has been no activity in the case other than the meeting held pursuant to 11 U.S.C. §341 and standard reports by the trustee (now John

[10]Rea's counsel repeatedly referred to the judgment as one for fraud. In fact, it was based on a fraudulent transfer to Crum in connection with a bulk sale of assets of UGI. A fraudulent transfer by UGI would not be based on "fraud" by Crum.

[11]Mr. Cure's claim was filed at the 11th hour, is hand-written, does not (as required by the form) attach a copy of the judgment on which it is based and was filed by Mr. Cure more than two years after the UGI case was closed according to the Court's records (and he was therefore discharged as trustee and no longer had the capacity to act for UGI). This not only raises questions about the claim, but, given Mr. Cure's expertise in the bankruptcy field, raises concerns in the Court's mind about how the claim came to be filed at all. Absent additional evidence, however, the Court will consider the claim (which was part of the record) at face value: a claim by someone other than Mr. Rea which is subject to obvious objections.

Spicer). Notably, the trustee has initiated no actions against Crum[12] or Rea and did not join in the Objection.

II. The Objection

On January 26, 2000, Rea filed the Objection, challenging pursuant to 11 U.S.C. § 522(l) certain of the exemptions claimed by the Debtor. Rea's challenges may be broken down into several categories:

1. Rea claims that "the value of all of the debtor's personal property together in the aggregate [sic] will exceed the value of $30,000 under applicable state law." Objection, ¶ 2.

2. Rea challenges Debtor's homestead exemption "because the debtor converted non-exempt assets into cash for the purpose of acquiring exempt real estate, with intent to hinder, delay or defraud the unsecured creditors of the debtor." Objection, ¶ 1. Though Rea does not use the "hinder, delay or defraud" formula with respect to the I.D.S. Annuity claimed to be owned by the Debtor's spouse (as well as being exempt under Art. 21.22 of the Texas Insurance Code), Rea asserts the annuity was acquired through "a transfer or conveyance of cash value to

[12]Of particular significance, Mr. Spicer has not brought any fraudulent transfer or conversion actions against Crum. Though Mr. Spicer mentioned "fraud" during his testimony at the July 26 hearing, he has not acted against Crum or anyone else. As the statute of limitations respecting fraudulent transfer suits (*see infra*) has now expired (11 U.S.C. § 546(a)), and as Mr. Spicer is a very experienced and competent trustee, the Court infers that Mr. Spicer concluded there was no viable action he could bring against Crum under state or federal fraudulent transfer laws. This conclusion is supported by Mr. Spicer's testimony regarding the absence of any fraudulent aspect to Crum's acquisition of his new house.

debtor's spouse within one year, in an effort to hide or secret [sic] assets from debtor's creditors, [sic] and constitutes a fraud on creditor. . .."[13] Objection, ¶5.

3. Rea asserts that certain insurance policies were acquired with non-exempt property and, by reason of the conversion of non-exempt into exempt property, may not be claimed as exempt. Objection, ¶ 6.

4. Rea invokes Fed. R. Bankr. P. 2017 to challenge the $13,000 held by Debtor's attorney to cover fees incurred in litigation Objection, ¶ 3.

5. Rea alleges that two automobiles, a 1995 Saturn and a 1998 Chrysler, were transferred by LDI to Debtor within one year of the filing of the Chapter 7 for less than fair value. Objection, ¶ 4.

III. Discussion

Broadly speaking, Rea's challenges to exemptions may be broken down into three general categories.[14] First, the Court will consider whether Crum improperly claimed as exempt personal property having a value in excess of the maximum permitted under Texas law. Second, the Court will address the $13,000 paid to Debtor's counsel. Finally, the Court will take up Rea's challenges based on various fraudulent transfer or conversion theories.

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[13]Though Mrs. Crum is the annuitant, Debtor is the beneficiary under the annuity and has claimed it falls within the exemption provided by Art. 21.22 of the Texas Insurance Code. Transcript of August 23, 2000, p. 74 ll. 1-11 (hereafter transcript citations will be "Tr 8/23" or such other date as is appropriate). This cite is to the argument of Debtor's counsel, who argues that exemption of the annuity may only be challenged if it was obtained with "intent to hinder, delay or defraud," and that Rea made no such allegation. However, Rea's assertion that the annuity was to secrete assets in fraud of creditors (if sloppy pleading) would be sufficient to meet that test.

[14]In ¶ 7 of the Objection Rea argues there is "equity in the property over and above any claim of exemption." While this parallels Rea's position on the personal property claimed as exempt, the Court will not address this contention directly. The trustee, a competent and experienced individual, is responsible for liquidating the chapter 7 estate. 11 U.S.C. §704(1). Rea should therefore advise Mr. Spicer of his position on this matter.

The burden of proof in any hearing on an objection to exemptions is on the party objecting. FED. R. BANKR. P. 4003(c). Thus, for Rea to be successful respecting any given item claimed as exempt he must show by a preponderance of the evidence that Crum is not entitled to it under 11 U.S.C. §522(b)(2) and applicable state law.[15]

A. The Personal Property

Rea's objection to Debtor's claim of exempt personal property based on the value of the property must be overruled. Assuming Debtor is bound by his initial determination to claim the exemptions authorized under Texas law for a single person, Rea has failed to show by a preponderance of the evidence that the property claimed as exempt under §42.001 of the Texas Property Code exceeds in value $30,000. Moreover, Debtor realized after his meeting of creditors held pursuant to 11 U.S.C. §341 that he was entitled to claim personal property as exempt up to the amount allowed a family, $60,000. If he was somewhat dilatory in doing so, he amended his schedules accordingly.

B. The $13,000 Paid to Counsel

The $13,000 paid to Debtor's counsel was paid after the commencement of the case. *See* Tr. 7/26, p. 26, l. 22 - p. 27, l. 6; p. 116, l. 25 - p. 117, l. 9. Since the $13,000 was paid to counsel after commencement of the case, any effort to cause counsel to disgorge it would be (as Rea states in the Objection) pursuant to Fed. R. Bankr. P. 2017(b). Rule 2017(b) permits only the Court, the United States trustee or the debtor to seek disgorgement or recovery of fees or retainers paid post-petition. Rea thus has no standing to attack the payment to counsel.

[15] Crum claimed no exemptions under federal law.

Moreover, a retainer held by counsel is not exempt property and the Objection is therefore not an appropriate place to raise issues under Rule 2017. For these reasons, as to the $13,000, the Objection is overruled.

C. Transfers and Conversions of Property into Exempt Property

The balance of Rea's complaints about the property claimed as exempt by Crum are not based on whether the property is covered by the exemption laws of Texas. Rather Rea argues that Crum improperly acquired the exempt property by converting other, non-exempt property to the detriment of his creditors.

1. **Standing**

The first problem with Rea's position is that he essentially seeks in the Objection to avoid the transactions by which Crum obtained property clearly within Texas' exemption statutes. However, that can be accomplished only be attacking those transaction under §42.004 of the Texas Property Code.[16]

Fraudulent transfer provisions of 11 U.S.C. § 548 and Chapter 24 of the Texas Business and Commerce Code would not apply to avoid conversion of non-exempt to exempt property. *See*, *Chandler v*. *Welborn*, 294 S.W. 2d 801, 804 (Tex. 1956) ("It is well settled that a conveyance of exempt property may not be attacked on the ground that it was made in fraud of creditors.") Thus, to avoid a claimed exemption, one must meet the test of § 42.004.

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[16] Section 42.004(a) states:

> If a person uses. . .property not exempt. . .to acquire. . .property which would be exempt. . .with the intent to defraud, delay or hinder an interested person from obtaining that to which the interested person may be entitled, the property... acquired is not exempt.

Though at first blush this would appear to give Rea standing to argue at least with respect to some of the property[17] at issue that it is not exempt, the Court holds that, in a bankruptcy case, authority to pursue an action under §42.004 passes to the trustee and may be asserted only by the trustee under 11 U.S.C. 544(b)(1). *See In re Mortgage America Corp.*, 714 F.2d 1266 (5th Cir. 1983); *see also Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000).

While § 42.004 could be construed as describing what property is exempt rather than as a statute authorizing avoidance of a conversion of non-exempt property, it clearly requires the party invoking it to show (1) conversion of non-exempt into exempt property; and (2) actual intent to delay, hinder or defraud on the debtor's part. Thus, it places a burden on the party to prove that a facially proper exemption should be overturned. The Court therefore concludes that § 42.004 is, in fact, an avoidance statute available in bankruptcy only to the trustee through section 544(b) of the Code. As discussed *supra*, n. 12, the trustee has brought no actions against the Debtor under §544(b) or §42.004 or even joined in the Objection.

There is, however, a procedure by which Rea could have obtained court authority to pursue avoidance actions on behalf of the estate. Essentially Rea would have had to demand that the trustee pursue the avoidance action. Upon the trustee's refusal to do so, Rea could then seek court authority to act himself as the representative of the estate. *See In re Gibson Group, Inc.*, 66 F.3d 1436, 1446 (6th Cir. 1995).

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[17]Section 42.002 does not apply to the homestead exemption. Similarly it would not apply to the transfer of the Chrysler from LDI to Crum, *see Litzler v. Sholdra*, 270 B.R. 64 (Bankr. N.D. Tex. 2001), though, arguably, Crum exchanged a non-exempt debt owed him by LDI for title to the Chrysler (as well as paying part of the purchase price of the car. Tr. 7/26, p. 104, ll. 12-22). On the other hand, Rea alleges transfer of the Chrysler was not for fair value, and the evidence in the record suggests (and the Court finds) that LDI was insolvent. Thus a creditor of LDI might pursue transfer of the Chrysler to Crum if Crum were not protected by the automatic stay. 11 U.S.C. § 362(a).

Rea did not follow this procedure, however, and the Court holds that he lacked standing to invoke §42.004 of the Texas Property Code.[18] Since the trustee is required to bring actions under § 544(b) within two years (11 U.S.C. § 546(a)), the trustee is now barred from proceeding against Debtor. As the Court has noted, given the experience and competence of the trustee, it may be inferred that the trustee concluded the actions Rea attempts to pursue are without merit.

On the other hand, Rea may have believed that, since the trustee was fully aware of the Objection and Judge Tillman countenanced its prosecution, he had permission to raise issues that properly should have been raised by the trustee. Thus, the Court will consider the merits of the Objection [19] as it pertains to non-exempt property allegedly converted into exempt property.

[18]Actually, Rea *did not* invoke § 42.004. Rather he appears to have relied on Section 548 of the Bankruptcy Code. Even if that statute may be used to recover property claimed as exempt, it, too, must be invoked by the trustee. Furthermore, Rea failed in the case of the Chrysler, the Saturn and the insurance policies to make any allegation that Crum sought to delay, hinder or defraud creditors. Such an allegation is a necessary element of any attempt to strip property of its exempt status. *See* § 42.004(a) of the Texas Property Code and Art. 21.22, § 3 of the Texas Insurance Code.

[19]The Court notes that it is a fair question whether conversion of non-exempt into exempt property should be raised by adversary proceeding. FED. R. BANKR. P. 7001(1) would ordinarily apply to a proceeding to avoid a transfer. *See also* 28 U.S.C. § 157 (b)(2)(H). The Court believes, however, that Crum has been afforded due process, and, in any event, he has raised no objection to the procedure used.

2. **Merits**

It is clear that a debtor is permitted to take full advantage of exemption laws.[20] Only if a debtor converts non-exempt assets to exempt property with actual intent to delay, hinder and defraud may the exemptions be attacked under Texas law.

To begin with, no evidence in the record supports the contention that the Saturn automobile or the insurance policies were obtained by Crum with actual intent to delay, hinder or defraud any creditor. The Court therefore holds that the Saturn and the insurance policies are properly claimed as exempt.

The exemption of Debtor's homestead is not subject to attack. *See In re Reed*, 700 F. 2d 986 (5th Cir. 1983). Moreover, unlike the debtor in the *Reed* case, Crum did not take advantage of Texas' ironclad homestead exemption at the eleventh hour, in contemplation of bankruptcy. His new home was acquired months before bankruptcy. Besides any desire to take greater advantage of his homestead entitlement, Crum had ample motive for moving to a new house given his ongoing blood feud with Rea. Thus, the Court finds that the new home was not purchased with an intent to delay, hinder or defraud creditors.

The annuity was purchased in 1998. While it is a closer question, the Court holds that the annuity also is properly exempt and finds it was not obtained with the intent to delay, hinder or defraud anyone. Not only did Crum purchase the annuity ten months prior to bankruptcy, but

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[20]The legislative history to § 522 states that "the debtor will be permitted to convert nonexempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law." *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 361 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6317; S. Rep. No. 989, 95th Cong., 2d Sess. 76, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5878, 5862. The Bankruptcy Code "adopts the position that the conversion of nonexempt to exempt property, without more, will not deprive the debtor of the exemption to which he would otherwise be entitled." *See In re Reed*, 700 F. 2d 986, 990 (5th Cir. 1983). Even an "eleventh hour acquisition of exempt property will not require disallowance of an exemption in the property"unless indicia of improper intent are present. *See* 4 COLLIER ON BANKRUPTCY §522.08[4] (15th ed. rev. 2001).

it is not credible that he converted non-exempt assets to exempt property because of the Judgment. Crum has been the subject of many judgements - four are reflected in the record, and Rea testified he had found eight or nine judgments outstanding against Crum. *See, e.g.*, Tr. 8/23 p. 36, ll. 18-23. It is not credible that Rea's judgment, which was the subject of the Settlement, would be the one judgment that would cause Crum to act, almost a year before his next payment was due under the Settlement, to hinder, delay or defraud creditors. Indeed, the evidence in the record supports Crum's assertion that he planned to comply with the Settlement and make the payment due in November 2000 (though, given the trail of unsatisfied judgments Crum left behind, the Court certainly does not believe his motive was "to do the right thing").

The same reasoning applies to the Chrysler. The Court finds that Rea has failed to show by a preponderance of the evidence that the Chrysler is not exempt or was acquired from an improper motive.

C. Costs

Surveying the entire record in this case, the Court believes neither Crum nor Rea qualifies as a victim of the other. The Objection appears not to have been well thought through; Rea's conduct has been more consistent with that of a party to a feud than an aggrieved creditor. Crum's history of good living and unpaid judgments warrants no sympathy either. If there is any victim in this case, it is the taxpayer, who must bear much of the bill for the use of the courts for the struggle between these men. Accordingly, the Court holds that each side shall bear its own costs.

IV. Order

For the foregoing reasons it is therefore

ORDERED that the Objection be, in all respects, overruled; and it is further

ORDERED that each party bear its own share of the costs, court costs, if any, being equally divided between them.

Signed this the 22nd day of February, 2002.

DENNIS MICHAEL LYNN,
UNITED STATES BANKRUPTCY JUDGE